Daniel Construction Company, A Division of Daniel International Corporation *and* Local Union No. 4 and its Branches, International Union of Operating Engineers, AFL-CIO. Case 1-CA-17113

September 14, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 4, 1981, Administrative Law Judge Peter E. Donnelly issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions and a supporting brief and a brief in partial support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The Administrative Law Judge found that Respondent violated Section 8(a)(1) of the Act by Employee Relations Manager Johnson's misstatement of law to employee Hamill. We find merit in Respondent's exceptions to this finding.

At one of Respondent's preelection "roundtable" meetings, employee Hamill asked Johnson whether she would have to join the Union if it won the election. He responded that she would have to do so. The Administrative Law Judge found Johnson's statement was inaccurate since an employee would have to join the Union only if the parties negotiated a collective-bargaining agreement which included a union-security provision. He concluded that the misstatement of law had a coercive effect since it induced "an incorrect concept of compulsory union membership which would affect employee free choice in the election." Although we agree that Johnson's statement was clearly a misstatement of law, we do not agree that it was violative of the Act.

Thus, in *Edward A. Utlaut Foundation, Inc., d/b/a Edward A. Utlaut Memorial Hospital and Fair Oaks Nursing Home*, 249 NLRB 1153, 1158 (1980), the Board concluded that an employer's preelection misstatement that if the union won the election the employees would have to join the union and pay dues, although objectionable, did not constitute a violation of Section 8(a)(1) of the Act. In so doing, the Board found that the employer's misstatement contained no express threat that the employer by its own action would impose dire consequences, such as discharge, on the employees and no implicit threat to the employees' rights. Johnson's similar misstatement of law contains no threat to interfere with the employees' rights and, therefore, is not coercive within the meaning of Section 8(a)(1) of the Act. Accordingly, we conclude, contrary to the Administrative Law Judge, that Respondent did not violate the Act by Johnson's statement to employee Hamill.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Daniel Construction Company, A Division of Daniel International Corporation, Greenville, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(b) and reletter the subsequent paragraph accordingly.

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT threaten employees with loss of future employment if they select Local Union No. 4 and its Branches, International Union of Operating Engineers, AFL-CIO, as their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We hereby correct the following inadvertent errors of the Administrative Law Judge which are insufficient to affect our decision. The Administrative Law Judge stated that the Union filed its representation petition on November 5, rather than November 7, 1979. He further set forth the name of counsel for the General Counsel as "Arnold S. Cohen," rather than "Ronald S. Cohen."

them by Section 7 of the National Labor Relations Act.

DANIEL CONSTRUCTION COMPANY, A DIVISION OF DANIEL INTERNATIONAL CORPORATION

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge: The original charge herein was filed by Local Union No. 4 and Its Branches, International Union of Operating Engineers, AFL-CIO, herein called the Union or the Charging Party, on January 31, 1980. An amendment thereto was filed on March 19, 1980. A complaint thereon was issued on March 28, 1980, alleging that Respondent violated Section 8(a)(1) of the Act by implementing changes in its benefits program and changing its system of granting wage increases. Further, that Respondent, through its representatives, made certain statements which interfered with the employees' organizational rights in violation of Section 8(a)(1) of the Act. An answer thereto was timely filed by Respondent. Pursuant to notice thereof, a hearing was held before the Administrative Law Judge at Rumford, Maine, on September 25 and 26, 1980. Briefs have been timely filed by the General Counsel and Respondent which have been duly considered.[1]

FINDINGS OF FACT[2]

I. RESPONDENT'S BUSINESS

Respondent is a South Carolina corporation engaged as a general contractor in the building and construction industry, with its principal office and place of business in Greenville, South Carolina. The Employer maintains a place of business at a papermill owned and operated by Boise Cascade Corporation in Rumford, Maine, where it is engaged in a construction project. During the past calendar year Respondent, in the course and conduct of its business operations, performed construction services valued in excess of $50,000 in States other than the States of South Carolina and Maine. During the past calendar year, in the course and conduct of its business operations, Respondent received at the above mill goods and materials valued in excess of $50,000 directly from points outside the State of Maine. Based on these jurisdictional facts, I find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Background

On November 5, 1979, the Union filed an election petition seeking to represent a unit of some 20 to 23 field engineers employed by Respondent at a construction project in Rumford, Maine, where Respondent is engaged in building an addition to a papermill owned by the Boise Cascade Corporation.[3] A decision directing an election issued on January 7, 1980.[4] An election was held on February 5, 1980. All ballots cast in that election have been impounded because the charge herein is a blocking charge, filed by the Union on January 31, 1980. No request to proceed has been filed thereto.

During January 1980, Respondent conducted a series of some four or five meetings described as "roundtable" meetings, wherein it made antiunion presentations apparently for the purpose of dissuading employees from selecting union representation. These meetings were attended by the field engineers and representatives of management, including Milling, Johnson, Machino, and Westbrook.

Gary Michelewicz testified that at one of the later "roundtable" meetings, Westbrook told him that a new salary review program and benefits had been introduced by Respondent and that he would advise them individually about the specifics of it at a later meeting. Michelewicz also testified that sometime later during the second or third week in January, he was called aside by Westbrook and told the details of the new salary review program as well as the specifics of other newly instituted company benefits. Michelewicz also testified that this conversation took place after the booklet "New and Im-

[1] The complaint was amended at the hearing. First, paragraph 7 was amended to reflect the correct titles of certain supervisory employees as follows: Emerson Johnson, manager, employee relations; George Machino, chief field engineer; Michael Westbrook, project personnel manager. Second, paragraph 8 was amended to add paragraphs (h), (i), and (j) as follows: "(h) In or about January 1980, Respondent, by its agent Michael Westbrook, at the mill, told an employee at a meeting that if the Union got in Respondent could not give a general increase to employees; (i) In or about January 1980, Respondent, by its agent Emerson Johnson, at the mill, told an employee at a meeting that if the Union came in she would have to join in the Union; (j) On or about January 29, 1980, Respondent, by its agent William Milling at the mill told employees at a meeting, 'It's no secret that Daniel is actively engaged in negotiating for the job in Madison. We don't know yet if we have the job, but I can tell you Madison Mills has decided to build that job open shop. I think it is fair to say that they will be watching the outcome of this election.'"

[2] There is conflicting testimony regarding many of the allegations of the complaint. In resolving these conflicts, I have taken into consideration the apparent interests of the witnesses. In addition, I have considered the inherent probabilities; the probabilities in light of other events; corroboration or lack of it; and consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar or apparent interests. In evaluating the testimony of each witness, I have relied specifically on his or her demeanor and have made my findings accordingly, and while apart from considerations of demeanor, I have taken into account inconsistencies and conflicting evidence, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Bishop and Malco, Inc. d/b/a Walker's*, 159 NLRB 1159, 1161 (1966).

[3] Respondent employs some 1,000 to 1,500 employees at this project including some 135 to 350 salaried employees. Approximately 20 to 23 of the salaried employees are field engineers in the classifications of nonexempt salaried employees. Overall, Respondent is an international corporation, operating about 200 construction projects and employing about 15,000 salaried employees and 50,000 hourly employees.

[4] All dates refer to 1980 unless otherwise indicated.

proved Benefits" (G.C. Exh. 4) had been given to him at a meeting at the end of January, prior to the election, in the meeting room of the trailer complex at the project.[5] Michelewicz testified that this meeting was attended by field engineers as well as other salaried employees, and that management representatives including Westbrook and "an accountant from Greenville" went over the new benefits and conducted a question-and-answer session.

Westbrook, on the other hand, testified that the booklet was distributed for the first time on February 12 and 13, when meetings were conducted, with all of the approximate 135 salaried employees by local and corporate management officials, including Hugh Earnest, director of personnel for Respondent stationed at Greenville, South Carolina. According to Westbrook, this was the only meeting of salaried employees concerning the new benefits attended by anyone from Greenville. Westbrook's memo, dated February 11, sets out those employees who were to attend and a schedule of five meetings to be conducted on February 12 and 13. A careful review of this record, including Westbrook's testimony and his memo of February 11, satisfies me that the meeting attended by Michelewicz and Poulin wherein the booklet was distributed to them actually took place on February 12 and 13, after the February 5 election and not at any of the "roundtable" meetings preceeding the election. Since Michelewicz and Poulin testified that their conversations with Westbrook took place after they had received the booklet, the conversations necessarily took place after the February 5 election and I so find. Accordingly, those statements, which I conclude were made by Westbrook, were made postelection, and will be evaluated as such.

Michelewicz testified, with respect to one of the "roundtable" meetings, that Westbrook told the employees, that "if the Union election succeeded that Daniel would never negotiate a contract. They would start bargaining at zero and that they would stretch the bargaining out over the whole course of the job and wages would end up being frozen for the whole job. Also our benefits would be frozen." Further, that "if the Union was voted in Daniel would start negotiating offering us zero dollars an hour." Further, "He said that they would start bargaining at zero and that they could freeze our wages because they wouldn't have to negotiate any more. They wouldn't have to negotiate a satisfactory contract they could hold it up until the job was over and our wages would be frozen until the job was over including our benefits."

According to Poulin, Westbrook told them at a "roundtable" meeting that, "until both parties agreed on a contract that wages and benefits would have to be frozen." Poulin also testified that Westbrook stated, "that the company could not give a general increase if the Union wanted to campaign during a bargaining session or a negotiating period. The Company gives an increase once a year; a general increase. I believe he said that that would be what they are or the Company could not give that increase." In addition, he testified that Westbrook said that "anytime a wage was granted to an employee during the bargaining or negotiating period was happening that the Union and the Company would have to approve it."

With respect to Johnson, Poulin testified that at one of the "roundtable" discussions, in response to a question, Johnson said that "if they were to go Union that the wages would not necessarily be increased, that the bargaining would begin at zero, and just as long as the Company bargained in good faith we might not even make as much as what we were making at that time." Again, in response to another question, Johnson told an employee that if Respondent went Union "if you stayed on the job you would have to be accepted into the Union."

Westbrook denies that he told the field engineers at any of the "roundtable" meetings that Respondent would not negotiate a wage increase, but rather told them that wage increases would have to be negotiated by the parties. He concedes that, after consulting counsel, he did say that wages would be frozen until agreement was reached by Respondent and the Union.

Westbrook also denies saying that Respondent would stretch out negotiations for the life of the job or that Respondent would never negotiate with the Union.

Likewise Johnson denies saying that bargaining would begin at zero, only that bargaining on wages and benefits would begin from where they are now and could go either up or down. Johnson, however, does concede that he did tell an employee (Dorothy Hamill) that he thought she would have to join the Union if the Union won the election. Having reviewed the entire record and in view of the above-noted credibility criteria, and particularly the confusion of dates in the minds of Michelewicz and Poulin as to their receipt of the booklet, I am satisified that the accounts of the "roundtable" meetings advanced by Westbrook and Johnson are the more accurate, and I credit them.

The General Counsel also contends that a portion of the written speech delivered at a "roundtable" meeting in late January also violated the Act. It is undisputed that at this meeting Project Manager William Milling stated, "It's no secret that Daniel is actively engaged in negotiating for the job in Madison. We don't know yet if we have the job, but I can tell you that Madison Mills has decided to build that job open shop. I think it is fair to say that they will be watching the outcome of this election."

Turning now to the new wage and benefit programs, Mary Ellen Farrell, wage and salary analyst for Respondent, testified that Respondent's wage and benefit programs are reviewed on a continuing basis and are implemented and administered on a companywide basis and applied to all construction sites in the United States.

With respect to the new wages and benefits program in issue, Farrell testified that work began in or about July 1979. The proposed wage increase received tentative final approval in late October or early November 1979; approval being tentative due to the fact that Respondent was observing the Federal wage guidelines es-

[5] Robert Poulin, another field engineer, also testified that the booklet was distributed about the third week in January, prior to the February 5 election, at a meeting of all salaried employees where "an accountant from Daniel's" explained the new wage program and benefits to them.

tablished by the council on wage and price stability and the establishment of the annual guidelines had been delayed. Respondent's fiscal year runs from November 1 to October 31, at which time wage increases are normally granted. In December 1979 without awaiting approval from the council, new wage and benefits were instituted, with the wage increases retroactive to November 1, 1979. In addition, a new system of granting increases, providing, *inter alia*, for shorter salary review periods was introduced to become effective January 1, 1980, along with certain other benefits.

It is undisputed that the wage program and benefits were not limited to the field engineers at Respondent's Boise Cascade project but were instituted and implemented corporatewide, at all construction sites to all salaried employees, including nonexempt salaried employees such as the field engineers wherever located.

The new salary program and benefits, while implemented at all Respondent's projects at the same time, were not explained to all employees at all projects at the same time. There were delays in dispatching corporate officials to the various jobsites, and it was not until February 12 and 13, that any formal explanation was made by corporate officials from Respondent's home office in Greenville, South Carolina, to the salaried employees at the Boise Cascade project in Rumford, Maine. This was done in a series of five meetings, over a period of 2 days, on February 12 and 13, as discussed above.

B. *Analysis and Discussions*

As to those allegations involving changes in the system of granting wage increases and the improved benefits, as well as the announcement and implementation thereof, it should be noted that Respondent is under no absolute prohibition in the matter of granting benefits to employees, even during the course of a union organizing campaign. However, it is true that benefits announced and granted during such a sensitive period will be closely scrutinized. Indeed, the Board has held, in the matter of granting wage increases, that there arises a strong presumption of illegality in the granting thereof during a union campaign; however, an employer is free to grant benefits as if the union were not in the picture, i.e., as it would in its normal business operations, absent any union organizing effort. *Newport Division of Wintex Knitting Mills, Inc.*, 216 NLRB 1058 (1955).

An examination of the pertinent evidence in the instant case convinces me that this presumption has been overcome by Respondent, inasmuch as it has shown ample justification for the benefits announced and implemented herein. First, the record shows that there exists a standard corporate program as to wages and benefits which is applied to all similarly classified employees. None of the Benefits involved in this case were limited to the employees being organized; i.e., field engineers at the Boise Cascade jobsite in Rumford, Maine.[6] Benefits in issue were granted nationwide at essentially all corporate jobsites, to all salaried nonexempt employees, including field engineers. The record discloses that Respondent normally granted companywide wage increases annually on November 1, in conformity to its fiscal year, and that the amount of the increases followed the guidelines established by the Federal council on wage and price stability. In 1979, however, bureaucratic delays in establishing the guidelines delayed final corporate approval of any wage increase until December, with wage increases retroactive to November 1, 1979. Certain other benefits, including a change in the system of granting wage increases, became effective companywide on January 1, although an official corporate explanation thereof did not take place at the Boise Cascade project until February 12 and 13, with more detailed individual employee explanations taking place thereafter through supervisors. In short, there is nothing in this record to suggest that the wage increases, changes in the wage system, or the new benefits in issue were announced, implemented, or granted so as to interfere with the field engineers at the Boise Cascade project in the matter of union representation. Rather, I am persuaded that the benefits were undertaken in the normal course of Respondent's business operations and would have taken place regardless of the union organizing effort among the unit of field engineers at Respondent's Boise Cascade jobsite.[7]

As to the allegation of coercion with respect to the above-quoted portion of a talk given by Milling, it is clear that Respondent was holding out to the field engineers the possibility of future employment with Respondent within the State of Maine at the Madison Mills in Madison, Maine. Milling's remarks clearly implied that if the Union succeeded in organizing the field engineers, Respondent would not get the contract for that job since "Madison Mills has decided to build that job open shop." While Respondent makes the assertion that Madison Mills had decided to build the job "open shop," Respondent nowhere makes any effort to substantiate this naked prediction of prospective loss of employment by objective considerations. Indeed, Milling did not even testify. In these circumstances, I conclude that Milling's remarks, as alleged by the General Counsel in its amendment to the complaint, were coercive in violation of Section 8(a)(1) of the Act.

With respect to the allegation that Westbrook told employees that wages would be frozen, I have credited Westbrook. Accordingly, I am satisfied that his remarks, viewed in context, were not threats, but were essentially accurate observations concerning negotiations in the event of a union victory, i.e., that in the event employees voted for union representation, any wage increase could not be unilateral, but would have to be negotiated between Respondent and the Union. This does not violate Section 8(a)(1) of the Act.

[6] The General Counsel, in its brief, renewed its objection to the receipt of certain of Respondent's exhibits. I adhere to my rulings as to those exhibits. However, the entire record herein, even apart from those exhibits, make it clear that the wage and benefit changes instituted by Respondent were companywide changes, not limited to the unit of field engineers at the Boise Cascade project.

[7] In view of my conclusion that certain statements alleged by the General Counsel as coercive, with the respect to Westbrook, occurred sometime after the booklet captioned "New and Improved Benefits" was distributed on February 12 and 13, those remarks concerning wages and benefits obviously must be viewed in a postelection context. Thus examined, I cannot conclude that such remarks, even assuming, as I do, that they were made, could have had any coercive effect.

As to the allegation that Respondent coerced field engineers by telling them that it could bargain from zero, I am satisfied that the record as to this allegation, viewed in its totality, shows that the import of these statements was to the effect that bargaining would begin, not from zero, but from whatever wages and benefits were at the time of negotiations, and that they could be modified either up or down, in conformity to whatever agreements Respondent and Union reached during the course of negotiations. Such statements do not violate Section 8(a)(1) of the Act.

Likewise, with respect to the allegation that Westbrook told the field engineers that Respondent would not give a wage increase to employees if the Union was voted in. In essence, Westbrook was telling the field engineers that if the Union was voted in, Respondent would no longer be free to grant wage increases without first negotiating with the Union for such wage increases. This is no more than an exposition of one aspect of Respondent's legal bargaining obligation and does not violate Section 8(a)(1) of the Act.

The General Counsel also alleges that Johnson coerced the field engineers by telling one of them that if the Union was elected to represent them they would have to join the Union. Johnson concedes that he said this. Obviously this statement is not accurate. Whether or not such an obligation ever arises depends upon whether or not the parties negotiated such a union-security type of provision. The promulgation of such misinformation does have a coercive effect since it induces an incorrect concept of compulsory union membership affecting the free choice of employees in the matter of union representation in violation of Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act. I shall recommend that Respondent be ordered to cease and desist therefrom and from infringing in any like or related manner upon its employees' Section 7 rights, and that it take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, and the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Daniel Construction Company, A Division of Daniel International Corporation, Greenville, South Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with loss of future employment if they selected Local Union No. 4 and Its Branches, International Union of Operating Engineers, AFL-CIO, as their collective-bargaining representative.

(b) Telling employees that if Local Union No. 4 and Its Branches, International Union of Operating Engineers, AFL-CIO, were selected as their collective-bargaining representative, they would have to join said Union.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its jobsite in Rumford, Maine, copies of the attached notice marked "Appendix."[9] Copies of said notice on said forms provided by the Regional Director for Region 1, after duly signed by Respondent's authorized representatives, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuously located places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."